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Supreme Court of the United States

OCTOBER TERM, 1949

ATLANTIC COAST LINE RAILROAD COMPANY and the DEPOSIT COMMITTEE for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974,

Petitioners,

vs.

ST. JOE PAPER COMPANY, ET AL.,

Respondents.

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(1) PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(2) MOTION TO DISPENSE WITH THE PRINTING OF THOSE PORTIONS OF THE RECORD CERTIFIED BY THE DISTRICT COURT TO THE COURT OF APPEALS WHICH WERE NOT PRINTED IN THE COURT OF APPEALS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Atlantic Coast Line Railroad Company and the Deposit Committee for First and Refunding Mortgage 5% Bonds of Florida East Coast Railway Company due 1974 respectfully pray that a writ of certiorari issue to review an order entered in the United States Court of Appeals for the Fifth Circuit on January 17, 1950, affirming an order of the District Court for the Southern District of Florida which disapproved a plan of reorganization of the Florida East Coast Railway Company, a debtor in a Section 77 proceeding, which had been certified to the District Court by the Interstate Commerce Commission.

Judges HUTCHESON and RUSSELL voted to affirm the order; Judge HOLMES dissented.

The Plan provides for a merger or consolidation of Florida East Coast Railway Company and Atlantic Coast Line Railroad Company, or a transfer of the properties of the former to the latter, cash and securities of Atlantic Coast Line Railroad Company to be distributed to creditors of Florida East Coast Railway Company. For that reason, and as an unsecured creditor of Florida East Coast Railway Company, Atlantic Coast Line Railroad Company is aggrieved by the order of the Court of Appeals.

The Deposit Committee represents a large number of holders of Florida East Coast Railway Company First and Refunding Mortgage Bonds having small holdings.

The questions are of public importance in connection with railroad reorganizations because they involve the functions of the Interstate Commerce Commission and the Courts in Section 77 proceedings. The order of the Court of Appeals is in conflict with applicable decisions of this Court, particularly *Ecker* v. *Western Pacific R. Corp.* (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1943) 318 U. S. 523 and *Reconstruction Finance Corpora-*

tion v. *Denver & Rio Grande Western R. Co.* (1946) 328 U. S. 495. It is also in conflict with decisions of other Courts of Appeals, including particularly *Old Colony Bondholders* v. *New York, New Haven & H. R. R. Co.* (1947) 161 F. (2d) 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & H. R. R. Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803.[1]

OPINIONS BELOW

The opinions in the Court of Appeals are not yet reported.

The opinion of the District Court is reported at 81 F. Supp. 926.

The reports of the Interstate Commerce Commission are at 252 I. C. C. 423 and 731, 254 I. C. C. 865, 261 I. C. C. 151 and 267 I. C. C. 295 and 729.

JURISDICTION

The decree of the Court of Appeals was entered on January 17, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

The questions presented, all of which are interrelated and involve the functions of the Interstate Commerce Commission and the Courts under Section 77 of the Bankruptcy Act, are as follows:

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[1] Also *Brooks* v. *St. Louis-San Francisco Railway Company* (C. C. A. 8th, 1946) 153 F. (2d) 312, cert. den. *Brooks, Administrator* v. *St. Louis-San Francisco Railway Co.* (1946) 328 U. S. 867, rehearing denied (1946) 329 U. S. 820.

Chicago Rock Island & Pacific Railway Company v. *Fleming* (C. C. A. 7th, 1946), 157 F. (2d) 241, cert. den. *Chicago, Rock Island & Pacific Railway Co.* v. *Fleming* (1946) 329 U. S. 780, *Harrison* v. *Fleming* (1946) 329 U. S. 780, *Axelrod* v. *Fleming* (1946) 329 U. S. 811.

St. Louis Southwestern Railway Company v. *Henwood* (C. C. A. 8th, 1946) 157 F. (2d) 337, 351, cert. den. *Southern Pacific Co.* v. *Henwood, Trustee* (1947) 330 U. S. 836, and rehearing denied *Meyer* v. *Henwood, Trustee* (1947) 331 U. S. 870.

(1) Whether, if the Commission has

(i) followed the statutory mandates,

(ii) found that the cash and securities receivable by a class of creditors under a plan constitute the "equitable equivalent of the rights of these creditors in and to the property of the debtor", and

(iii) had material evidence to support that finding and its conclusion that the plan meets with the requirements of sub-sections (b) and (e) of Section 77,

the District Court or the Court of Appeals may nevertheless disapprove the plan on the ground that it is not "fair and equitable" and "does not afford due recognition to the rights of each class of creditors and stockholders" even while conceding that there is no issue with respect to the relative treatment of the different classes and hence no problem as to compliance with the "absolute priority" rule.

(2) Whether in order to approve a plan certified by the Interstate Commerce Commission the District Court must be independently "satisfied", in the colloquial or subjective sense, that the plan is "fair and equitable" and "affords due recognition to the rights of each class of creditors and stockholders".

(3) Whether under the circumstances set forth in (1) the District Court or Court of Appeals may disapprove a plan on the ground that the Commission overemphasized or was preoccupied with the public interest and consequently subordinated "the primary question of the legal and equitable rights of the bondholders as such", without indicating that any such overemphasis or preoccupation prevented the Commission from meeting the requirements referred to in (i), (ii) and (iii) of (1) above.

(4) Whether, in determining whether or not a plan certified by the Commission should be approved, the District Court or Court of Appeals should be influenced (and if so, to what extent) by the opposition of members of a class of creditors.

(5) Whether it is consistent with this Court's ruling in the *Western Pacific* case (318 U. S., p. 468) that "§ 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the Court" for the District Court or the Court of Appeals to rule that a plan for a merger[1] of a debtor with another railroad corporation, which is authorized by Section 77 (b) and approved by the Commission, "ought to be a last resort".

(6) Whether the following statement in the opinion of the District Court affords a basis for the disapproval of a plan certified by the Commission:

> "• • • I am impressed that evidence produced before me, if it had been before the Commission, might have produced a different result. The materials for some of it already existed, but were not assembled for or considered by the Commission, and some relate to occurrences since it made its finding".

no distinction being made between (i) evidence relating to conditions existing prior to or at the time of the Commission's Report and (ii) evidence relating to alleged changes in conditions subsequent to the Commission's Report.

(7) Whether such a statement as that quoted in (6) constitutes a finding to which Rule 52 (a) of the Federal Rules of Civil Procedure applies.

(8) Whether, particularly in view of the provisions of Section 3 (a) (3) of the Mahaffie Act, approved April 9, 1948 (62 Stat. 162, 167-168),[2] the District Court or the Court of Appeals may disapprove a plan certified to the District Court by the Interstate Commerce Commission on April 5, 1948 on the ground that there have been "any changes, facts or developments which have occurred since December 31, 1939."

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[1] Throughout we use the term "merger" to denote a merger, a consolidation or a unification by transfer or conveyance. The Plan authorized the Court to utilize any one of these three methods of unification (267 I. C. C. 748).

[2] Appendix, p. v-vi.

(9) Whether this Court may direct the approval of the Plan certified by the Interstate Commerce Commission notwithstanding disapproval of such Plan by the District Court and affirmance by the Court of Appeals.

STATUTES INVOLVED

The pertinent provisions of Section 77 and of the Mahaffie Act are copied in the Appendix.

STATEMENT OF THE CASE

Preliminary: Copies of the Reports of the Interstate Commerce Commission of January 8, 1945, April 8, 1947 and March 25, 1948 (261 I. C. C. 151, 267 I. C. C. 295, 267 I. C. C. 729), to which we will refer, will be found in the forepart of Volume I of the Record.

The opinion handed down by Circuit Judge SIBLEY as U. S. Judge Designate in the District Court,[1] which was adopted by Judge RUSSELL in the Court of Appeals, will be found in Vol. II of the Record at p. 466-481.

The Debtor: The Florida East Coast Railway Company has a principal line between Jacksonville and Miami and other branches or extensions. It has outstanding (1) equipment obligations, (2) First Mortgage 4½% Bonds, (3) First and Refunding Mortgage 5% Bonds, (4) unsecured debts and (5) capital stock.

The Atlantic Coast Line Railroad Company: The railroad lines of the Atlantic Coast Line include a double-tracked main line from Richmond, Virginia, to Jacksonville and main lines extending from Jacksonville to Montgomery, Birmingham, Atlanta and Tampa. The Coast Line has long had close relations with the Florida East Coast, whose main line from Jacksonville to Miami is geographically an extension of the Coast Line. Of the East Coast's interchange at Jacksonville, almost 100% of

[1] Designated to hold the District Court because of the illness of Judge STRUM (R. 6).

the passenger interchange and about 50% of the freight interchange are with the Coast Line (267 I. C. C. 310-312).

Judge HUTCHESON's opinion inadvertently assumes that the Atlantic Coast Line has a main line "extending from Jacksonville to Miami" (R. 942) and refers to the Atlantic Coast Line as a "railroad company coveting, and pressing to possess, a competing debtor railroad company". The Atlantic Coast Line has no line from Jacksonville to Miami and the Commission found that the two railroads are "practically noncompetitive" (267 I. C. C. 311). They are connecting roads, not competitors.[1]

The Deposit Committee: Before the District Court the Deposit Committee was the authorized spokesman for 260 bondholders (R. 321). As the 260 bondholders held only $572,400 of Bonds, the Committee is referred to in Judge HUTCHESON's opinion as the Atlantic Coast Line's "small but faithful ally" (R. 939) and again as the Coast Line's "small but earnest ally" (R. 942). As is clearly shown by the record (R. 345-375), the Deposit Committee is supporting the Plan only because it believes it to be the best available plan for the many small bondholders whom it represents. Its sole interest in the case is to obtain the best possible treatment for those bondholders.

Proceedings Prior to July 20, 1945: The Florida East Coast was in equity receivership from August 31, 1931 to January 25, 1941, when the reorganization proceeding under Section 77 was instituted. In 1942 the Commission approved a plan of reorganization (R. 529-689), but war earnings resulted in such a large "unallocated cash surplus" that on motion of all of the parties District Judge STRUM remanded the plan to the Interstate Commerce Commission (R. 690-697).

After further proceedings, on January 8, 1945 the Commission approved a plan for an independent or in-

[1] The paragraph in Judge HUTCHESON's opinion about the Atlantic Coast Line was taken largely from a paragraph in the Atlantic Coast Line's brief but the name *Miami* was inadvertently substituted for the name *Montgomery*.

ternal reorganization (261 I. C. C. 151-193). After considering petitions for modifications and hearing oral argument, on July 20, 1945 the Commission reopened the proceedings to receive evidence with respect to the modification of the plan of January 8, 1945 "and for the proposal of other plans" (267 I. C. C. 295-296).

Proceedings Between the Reopening of the Case on July 20, 1945 and the Certification of the Plan on April 5, 1948: After the reopening of the record the Atlantic Coast Line proposed a plan of reorganization (267 I. C. C. 297-298). The Commission found that the Coast Line's proposal was inadequate and required more favorable treatment for the bondholders (267 I. C. C. 349-356); the Commission's Plan thus differs materially from that proposed by the Coast Line (267 I. C. C. 374-379). Judge SIBLEY's statement that the Atlantic Coast Line "proposed it", meaning the Commission's Plan (R. 470), is incorrect, as is also Judge HUTCHESON's reference to the Atlantic Coast Line as "the proposer of the plan" (R. 939).

Commission hearings were held consuming substantially the entire month of November, 1945, as a result of which 3,057 pages of transcript were added to the prior 1,445 pages. At the hearing and by an order of the Commission entered on June 27, 1946, no less than 214 exhibits were added to the 89 which had previously been introduced in the record.

On July 20, 1946 Commission Examiner R. H. Jewell issued a proposed report recommending a plan for an internal reorganization similar to that approved by the Commission on January 8, 1945 (R. 730-848). After considering exceptions to the proposed report and briefs and hearing two full days of oral argument in October, 1946, the Commission under date of April 8, 1947 issued a report and order approving the Plan for a merger with the Atlantic Coast Line which the Court later disapproved.

After the Commission had considered petitions for reargument and supporting briefs, a reargument took place

in January, 1948, two and one-half days being devoted to it.

On the reargument it was stipulated that the Commission might consider the earnings reports of the two railroads up to the date the Plan was certified to the Court. Hence the Commission had before it the most recent earnings of the two railroads (267 I. C. C. 738-740).

On March 25, 1948 the Commission issued a report denying the petitions for modifications by a vote of six to five (267 I. C. C. 729-747).

The first and most vigorously developed ground for the minority dissents to the Commission's two reports was that the Plan violated the "absolute priority" rule (267 I. C. C. 390-391, 745-747). The dissents reflect a complete misconception of the "absolute priority" rule; as Judge HOLMES pointed out (R. 951), none of the four Judges has agreed that the Plan violates the rule or even that any question involving the priority rule is presented.

The Commission's Plan: The Plan certified by the Commission and disapproved by the Court provides for the assumption of the Debtor's equipment obligations (267 I. C. C. 749) and for the payment of the First Mortgage Bonds in cash (267 I. C. C. 756). The capital stock was held to be without value and no objection was made to the holding (267 I. C. C. 756). Consequently everything distributable under the Plan would go to the holders of the First and Refunding Mortgage Bonds, except what may be distributed to the holders of unsecured claims in respect of the unmortgaged assets.[1]

The Plan provides that

1. All "excess cash" in the estate, as defined in the

[1] There are substantial unmortgaged assets. While the Commission was inclined to the view that all of the assets were subject to the First and Refunding Mortgage, it recognized that the Court might hold that there were unmortgaged assets and accordingly included in the Plan a flexible provision to cover that contingency (267 I. C. C. 365-372, 756). The District Court later held that the principal disputed items referred to in the Commission's Report (267 I. C. C. 366) and certain other items were unmortgaged. An appeal and cross-appeals were taken from the Order but they have been dismissed on consent and the Court's determination that there are substantial unmortgaged assets has therefore become final.

Plan, shall be distributed to the holders of the First and Refunding Mortgage Bonds (267 I. C. C. 749).

2. All of the balance of the estate, including the railroad, shall be vested in the Atlantic Coast Line Railroad Company by merger, consolidation or transfer, in exchange for cash to be paid by the Atlantic Coast Line and securities to be issued by the Atlantic Coast Line (267 I. C. C. 748, 750-754).[1]

The Commission's Findings: The Commission's findings covered all issues:

The Public Interest

The Commission's findings related to both (1) the advantages of a merger plan as compared with any plan for an internal reorganization and (2) the disadvantages of an internal plan which would result in control by the St. Joe Paper Company.

As to the advantages of a merger plan, the Commission found that such a plan would result in

(1) "greater financial stability" (267 I. C. C. 339-343, 389), a factor of first importance in determining the fate of a railroad which has been in the hands of the Courts since 1931;

(2) important economies of operation (267 I. C. C. 322-325, 388), also a factor of great importance at a time when the railroads have to face rising costs and serious competition from other forms of transportation; and

(3) betterment of service (267 I. C. C. 318-322, 327-328, 388).

Much of the large record before the Commission and considerable portions of its Report of April 8, 1947 were

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[1]

Cash	$ 4,125,000
Divisional First Mortgage fixed interest 3½% Bonds	13,500,000
Divisional Second Mortgage Income 4¼% Bonds	7,875,000
Participating Cumulative 4% Preferred Stock	9,000,000
Common Stock (stated at $100 per share)	6,000,000
Total	$40,500,000

devoted to these subjects. They were dismissed by Judge SIBLEY with the following statement (R. 468):

> "After a very lengthy discussion the Commission concluded in general terms that there would be betterment of service and economies of operation and increased financial stability by the merger with the Coast Line, and more experience and less distraction by other interests, than if St. Joe Paper Company controlled; * * *"

Judge HUTCHESON's opinion contains no hint that the Commission found that there would be any advantages from a merger plan.

As to the disadvantage of control of an independently reorganized Florida East Coast by the St. Joe Paper Company, the Commission found that such a control would not be compatible with the public interest (267 I. C. C. 389).[1] Judge SIBLEY and the three Judges who heard the case in the Court of Appeals all accepted the Commission's finding on this point as binding.

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[1] The basis for that finding is the record with respect to the St. Joe Paper Company (267 I. C. C. 313-316, 343-347). It is an operating-holding company controlled by the charitable Trust created under the will of Alfred I. du Pont. The St. Joe Paper Company or the charitable du Pont Trust either separately or together control the Florida National Group of twenty-one banks (R. 438); two important industrial enterprises, the St. Joe Paper Company (267 I. C. C. 314) and Herring-Hall-Marvin Safe Company (R. 445); Union Terminal Warehouse Company at Jacksonville, Florida's largest warehouse (267 I. C. C. 345); Appalachicola Northern Railroad Company; St. Joseph Dock and Terminal Company; St. Joseph Telephone and Telegraph Company; the Alfred I. du Pont Building in Miami; real estate, some improved and some unimproved, on the East Coast of Florida, worth many millions of dollars; and more than 470,000 acres in northwest Florida.

In so holding the Commission followed the policy which it had laid down in *Proposed Construction of Lines by Piedmont & Northern Railway Company* (1928) 138 I. C. C. 363. (See majority opinion at p. 401 and occurring opinion of Commissioner Eastman at p. 402). At the time when the Commission's reports were handed down, this Court's decision in *United States* v. *Elgin, Joliet & Eastern Railroad Company* (1936) 298 U. S. 492 created some uncertainty whether the "commodities clause" of the Interstate Commerce Act indicated any Congressional policy against the common control of a carrier and a shipper, as distinguished from control by a carrier of a shipper. The opinions in *United States* v. *South Buffalo Railway Company* (1948) 333 U. S. 771 would seem to eliminate any doubt as to the policy intended to be implemented by the commodities clause, even though the scope and effect of that clause remains limited because of the application of the rule of *stare decisis*.

Private Interests

As already noted, the Commission disapproved the plan proposed by Atlantic Coast Line as inadequate and required the substantially more favorable terms for the Florida East Coast bondholders which are now embodied in the Plan.

In its Report of April 8, 1947 the Commission considered the factors bearing on the valuation of the debtor's property, in terms of Atlantic Coast Line securities, in great detail.[1] The comprehensiveness of the Commission's consideration of the treatment of the bondholders is important, because one of the grounds, discussed below (p. 23-26), that Judge HUTCHESON gave for the affirmance of the order disapproving the Plan was that the Commission had been too preoccupied with matters of the public interest.

With respect to the Plan it found (267 I. C. C. 379):

> "We find that the above securities and cash payment of the Coast Line, together with any other cash distributable to the first and refunding bondholders of the debtor's estate, will constitute, in view of the greater stability of earnings in the future, which

[1] The Report of April 18, 1947 contains a description of the Coast Line plan (267 I. C. C. 297-298); a description of the Atlantic Coast Line and its intercorporate relationships (p. 310-313); a section entitled *"Prospective savings from unification"* (p. 322-325); another entitled *"Future financial stability of the debtor"* (p. 339-343); a series of parts entitled "FAIRNESS OF THE COAST LINE PLAN", "EFFECTIVE DATE", "PROPOSALS AND CONCLUSIONS WITH RESPECT TO AN INCREASE IN VALUATION OF THE DEBTOR'S PROPERTY", "MANDATORY DISTRIBUTION OF AVAILABLE CASH" and "CASH RESERVES", (p. 349-365), all of which deal primarily with the treatment of the bondholders; another part entitled "PROVISIONS OF PLAN APPROVED" (p. 372-379), which deals almost exclusively with the treatment of the bondholders; succeeding sections largely technical but directly affecting the bondholders (p. 379-387); and the "SUMMARY OF FINDINGS" *and* "CONCLUSIONS" (p. 387-390). Of the 16 pages in the Report of March 25, 1948 approximately nine full pages deal with the treatment of the bondholders (267 I. C. C. 735-744).

Moreover, the factual bases for the Commissions' judgment as to the "equitable equivalence" of the exchange provided for in the Plan included not merely what was specifically referred to in the Reports of April 8, 1947 and March 25, 1948; they included many factors referred to in the Report of January 8, 1945, particularly the parts headed "AMOUNT OF CAPITALIZATION", "CASH RESOURCES AND PROBABLE CASH REQUIREMENTS", "EFFECTIVE DATE" and "NEW CAPITAL STRUCTURE" (261 I. C. C. 158-172). Of course many of the figures referred to in the Report of January 8, 1945 were out of date by April 8, 1947 or March 25, 1948, but other figures or facts, or expressions of judgment by the Commission in the Report of January 8, 1945, continued to be pertinent.

> should be realized in the unified properties under Coast Line control as compared with independent management, the equitable equivalent of the rights of these creditors in and to the property of the debtor."

The briefs filed on the reargument, and the reargument itself, dealt fully with the question of the treatment of the holders of the First and Refunding Mortgage Bonds. As already stated, it was stipulated that the Commission might consider the latest available earnings records of the two roads and it did so (267 I. C. C. 738-740). The Commission affirmed the findings which it had made on April 8, 1947 (267 I. C. C. 744-745).

The Commission indicated that it was particularly impressed by a test showing how the Plan and the alternative internal plan would have worked out during the 12 months ended October 31, 1947, the latest period for which figures were available, saying (267 I. C. C. 740-741):

> "The result showed, without taking into consideration the cash payment of $4,125,000 to be made by the Coast Line under the approved merger plan, more favorable treatment of present first and refunding bondholders under the approved merger plan in annual return per distributive share."[1]

Objections to the Plan and Evidence in the District Court: On behalf of the bondholders objections to the Plan were filed by the following:

The St. Joe Paper Company, which with the Alfred I. duPont Trust holds $25,000,000 of the First and Refunding Mortgage Bonds. The supporters of the Plan contend that the objection is due to a desire to add the Florida East Coast Railway Company to the other enterprises of the duPont Trust,[2] regardless of the interests of the national

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[1] The test referred to by the Commission will be found in Schedule C2 to A. C. L. Exhibit No. 18 in Volume II of the record; a similar test introduced in the District Court covering the 12 months ended October 31, 1948 is A. C. L. Exhibit No. 20.

[2] See above, p. 10, Note 1.

transportation system and of the bondholders as a class, in order to benefit the objectors' other enterprises and extend their power.

The Claughton Group, holding about $3,500,000 of Bonds.[1] Claughton himself, the largest holder in the Group, had $2,599,000 of Bonds pledged to one of the Florida National Group of banks controlled by the St. Joe Paper Company (R. 300) and all of the other members of the Claughton Group have, or have had, similar pledges (R. 297-301, 442-444).

The Conn Group, holding $1,008,500 of Bonds. Mr. Conn is an ardent believer in a "debt-free" reorganization (R. 383-385), which the Commission declined to approve long before there was any plan for a merger with the Atlantic Coast Line (261 I. C. C. 170-171).

The Lynch interests, holders of about $3,000,000 of Bonds, have opposed every plan except one they themselves proposed. With respect to the plan for an internal reorganization which the Commission approved on January 8, 1945 they said: "This is the harshest plan of reorganization that has been called to our attention".[2]

The Mortgage Trustees: The Mortgage Trustees were appointed by the St. Joe Paper Company and they opposed the Plan despite studies made by their own statisticians which indicated that the Plan was more favorable than an internal plan (R. 376-377), principally on the ground that "the Trustee is ordinarily persuaded, and should be, by a large majority of its bondholders" (R. 379).

Throughout the proceedings in the Courts below the petitioners contended that the objections that the Plan is not "fair and equitable" bear no relation to the statutory tests under Section 77 and that the objections of the St. Joe

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[1] In the Record the Claughton Group is referred to as "W. G. Welbon, et al." (R. 43-78, 297-319).

[2] See petition for modification, p. 3, included in Item 5 of A. C. L.: Designation, Vol. II, p. 493.

Paper Company, the Claughton Group and the Conn Group have been based on considerations not common to the bondholders as a class.

The Deposit Committee, representing 260 holders of $572,400 of Bonds, supported the Plan. An expert for the Deposit Committee testified in the District Court, in explanation of the position of that Committee, that the Plan provided substantially more favorable treatment than could be obtained through an internal plan (R. 345-375; Deposit Committee's Exhibits 1-6). Judge SIBLEY apparently did not disagree with the expert's judgment but discarded the evidence on the ground that the Committee and its "clients are not interested in being stockholders or helping to run the railroad" (R. 470).

The holders of the remaining $10,919,100 of Bonds were not represented.

Considerable other evidence was taken in the District Court, some of which will be referred to briefly below.

The Opinions in the District Court and Court of Appeals: Judge SIBLEY disapproved the Plan on three grounds, summarized in the first footnote to Judge HUTCHESON's opinion (R. 938) as follows:

> "(1) That the provision of the plan for a forced merger with Atlantic Coast Line, over the objection of an overwhelming majority of the bondholders of the debtor, was not in accordance with statutory provisions and, therefore, beyond the power of the Commission to propose and approve.
>
> "(2) That if wrong in this and the proposed plan is a lawful one, the court should not approve it because it is clear that if it is approved, all of the opponents of it will oppose its confirmation, and since the objectors are reasonably justified in objecting to it and are not merely obstructors, and the court ought not to, and would not, confirm it over their objections, approval of it now would be in vain.

"(3) That the plan is not fair and equitable and does not afford due recognition to the rights of refunding bondholders."

Although Judge RUSSELL adopted all three of Judge SIBLEY's grounds for disapproval of the Plan, the third ground was the sole basis for the affirmance of Judge SIBLEY's order, since Judge HOLMES disagreed with Judge SIBLEY on all three grounds (R. 950-954) and Judge HUTCHESON agreed with Judge SIBLEY only as to the third ground (R. 945-946). As to the first ground, Judge HUTCHESON expressed definite disagreement with Judge SIBLEY (R. 946-948).[1] As to the second, Judge HUTCHESON agreed with the appellants that Judge SIBLEY's holding was "an anticipatory ruling on a matter not then before him" and limited himself to saying that under the circumstances there was "nothing seriously amiss in his action in ruling anticipatorily as he did" (R. 948).

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[1] Judge SIBLEY clearly ruled that the mere fact that a majority in amount of the holders of the First and Refunding Mortgage Bonds opposed the Plan made it *per se* unlawful (R. 475-476), although his discussion of the point contained comments which were not directly relevant. The basis given for the ruling was the "history of the legislation", which was the subject of extensive discussion in the briefs in the Court of Appeals.

Judge HUTCHESON said (R. 946-947):

> "With the first reason, as broadly put by the trial judge, that, because the plan provided, over the objection of the bondholders, for merging the debtor with Coast Line, without having the properties put up for sale, it would not be lawful under the statute, we cannot agree.
>
> * * * *
>
> "We are in no doubt, however, that a plan providing for what the trial judge broadly called a 'forced merger', that is, a merger over the objection of the debtor and all its creditors, might be lawfully certified to the court and lawfully approved and confirmed by it."

He later said (R. 948):

> "We agree with the trial judge that upon the facts of record and his findings, and in the light of this determination of the commission, such a forced merger as is now proposed is contrary to the statute."

It is clear that Judge HUTCHESON used the words "such a forced merger as is now proposed" as a means of expressing an over-all judgment that the Plan was not "fair and equitable" in the colloquial sense and did not intend to modify his previously expressed opinion that a merger plan could be approved and confirmed "over the objection of the debtor and all its creditors".

REASONS FOR GRANTING THE WRIT

QUESTIONS (1) AND (2)

The Functions of the Commission and the Courts With Respect to the Treatment of Creditors Under a Plan

In *Palmer* v. *Massachusetts* (1939) 308 U. S. 79, *Ecker* v. *Western Pacific R. Corp.* (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.* (1943) 318 U. S. 523, *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western R. Co.* (1946) 328 U. S. 495, *Insurance Group Committee* v. *Denver & Rio Grande Western R. Co.* (1947) 329 U. S. 607 and *Callaway* v. *Benton* (1949) 336 U. S. 132, this Court has defined the powers of the Commission and the Courts in Section 77 proceedings. The *Western Pacific, Milwaukee* and *Denver* cases have, in particular, marked out their respective responsibilities in connection with the approval and confirmation of plans of reorganization.

The *Western Pacific* and *Milwaukee* cases in 1943 were generally accepted as eliminating the dark fog of uncertainty over the respective functions of the Commission and the Courts in connection with approval of the plans, and the first *Denver* case in 1946 was similarly accepted as removing the threat of a "blockade" in connection with the confirmation of plans. This Court's opinions made Section 77 workable; confirmed the intent of Congress to give the Commission "leadership" in connection with plans of reorganization involving both the public interest and private interests and to limit the participation of the Courts to the discharge of essentially judicial functions; and cleared the way for the completion of plans for railroads having a large portion of the mileage of the country.

The holdings in the *Western Pacific* and *Milwaukee* cases were summarized in the first *Denver* case (328 U. S. 509):

> "To the courts, Congress confided the power to review the plan to determine whether the Commission

> has followed the statutory mandates of subsection (e), 318 U. S. at 477, and whether the Commission had material evidence to support its conclusions. 318 U. S. at 477; concurring opinion at 512."

With respect to the treatment of creditors Justice REED's opinion in the *Western Pacific* case said (318 U. S. 472):

> "Valuation is a function limited to the Commission, without the necessity of approval by the court. The first sentence of the last paragraph of subsection (e) provides:
>
> > " 'If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan.'
>
> The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise."

Justice DOUGLAS's opinion in the *Milwaukee* case said (318 U. S. 565-566):

> "It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old."

The Commission culminated its extensive discussion of the treatment of the creditors with the following finding (267 I. C. C. 379):

> "We find that the above securities and cash payment of the Coast Line, together with any other cash distributable to the first and refunding bondholders of the debtor's estate, will constitute, in view of the greater stability of earnings in the future, which should be realized in the unified properties under

> Coast Line control as compared with independent management, the equitable equivalent of the rights of these creditors in and to the property of the debtor."

It also made a finding in the express terms of subsection (d) of Section 77 that "the plan as thus modified will meet the requirements of section 77 (b) and (e) of the above act" (267 I. C. C. 390).

There could be no issue with respect to the relative treatment of the different classes of creditors and hence no problem as to compliance with the "absolute priority" rule: the First Mortgage Bonds would be paid in cash and no objection to their payment has been made; the participation of the unsecured creditors is based exclusively on their interest in unmortgaged assets and is clearly proper (*Milwaukee* case, 318 U. S. p. 569); and the stockholders do not object to their exclusion from participation. As Judge HOLMES pointed out (R. 951), neither the District Court nor the Court of Appeals held that the Plan violated the "absolute priority" rule.

The opinion of Judge SIBLEY, which was adopted by Judge RUSSELL, reflects a reluctance to accept this Court's delineation of the functions of the Commission and the courts. Judge SIBLEY said (R. 474):

> "And on the matters about which the statute says the judge must be satisfied in order to approve a plan or confirm it over rejection, he has the right to make his independent investigation and is not bound by the conclusions of the Commission thereon. That the judge is not restricted to the facts certified by the Commission but may take additional evidence, is shown by the requirement that if the matter is sent back to the Commission a copy of the additional evidence shall be sent to the Commission. What is fair and equitable and what gives due recognition to the rights of each class of creditors and stockholders, and what is the law of the land, are matters of a judicial nature and within the peculiar expertness of the courts. On them the judge has the last word."

Under this Court's decisions the Commission's finding of value (in terms of Atlantic Coast Line cash and securities) established the adequacy of the consideration to be provided under the Plan for the Debtor's property. If that finding was not vulnerable, and if there was no violation of the "absolute priority" rule, there was no basis for the disapproval of the Plan by the Court.[1]

However, Judge SIBLEY construed the mere reference in the first sentence of the second paragraph of subsection (e) to "any evidence received"[2] in the Court as giving the Court discretionary authority to receive evidence on any subject and to conduct an "independent investigation" to determine whether the Court should be "satisfied",[3] in the colloquial or subjective sense, that the Plan was "fair and equitable". Judge SIBLEY applied the test of "colloquial equity" as determined by the Court—a test rejected by this Court in *Securities and Exchange Commission* v. *Central-Illinois Securities Corporation* (1949) 338 U. S. 96, in construing Section 11(e) of the Public Utility Holding Company Act of 1935 despite the absence of any provision in that Act similar to the valuation paragraph in subsection (e) of Section 77.[4]

During the course of the hearing in the District Court Judge SIBLEY indicated that the Commission's function is similar to that of a Special Master and that, so far as the private interests are concerned, the effect to be given to a report of the Commission "does not vary substantially from the effect given a master's report" (R. 168-169). Despite some indication in Judge SIBLEY's opinion of formal deference to the Commission's findings, the opinion as a whole leaves no doubt that he considered the Commis-

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[1] See, in addition to the cases already cited, *Case* v. *Los Angeles Lumber Products Co.* (1939) 308 U. S. 106, 115-119; and *Securities and Exchange Commission* v. *United States Realty and Improvement Co.* (1940) 310 U. S. 434, 452.

[2] See p. iv of Appendix.

[3] See p. iii of Appendix.

[4] See p. iv-v of Appendix.

sion's responsibilities with respect to the treatment of the bondholders analogous to that of a Special Master.

To some extent Judge HUTCHESON left his conception of the respective functions of the Commission and the Courts to inference, but the inference to be drawn from his opinion is clear. Referring to the appellants' contentions, stated below as we have just stated them here, Judge HUTCHESON said (R. 940):

> "Appellants citing the *Western Pacific*, the *Milwaukee*, and the *Denver* cases,[7] take an exceedingly small and dim view of the powers and functions accorded to the trial judge by Section 77(e) of the Bankruptcy Act, a very large and generous one of the powers of the commission, under Section 77(d). • • •"

"[7] 318 U. S. 448; 318 U. S. 523; and 328 U. S. 495."

On the other hand, Judge HUTCHESON said (R. 940-941):

> "Appellees, on their part, invoking the same authorities relied on by appellants, and, in addition, the authorities cited in the margin,[8] and pointing to the clear and unambiguous language of Sec. 77(e) of the Bankruptcy Act, take large and generous views of the powers of the trial judge, • • •"

"[8] *Benton* v. *Calloway*, 165 F(2) 877; *Insurance Group* v. *Denver*, 329 U. S. 607; *Comstock* v. *Group of Institutional Investors*, 163 F(2) 350, affirmed 335 U. S. 211."

The inference is clear that, when the Judge referred to what he called "the clear and unambiguous language of Sec. 77(e) of the Bankruptcy Act", he had in mind the colloquial connotation of the words "satisfied" and "fair and equitable". And when he referred to the "exceedingly small and dim view of the powers and functions accorded to the trial judge" he was speaking of a view of the District Court's powers which was phrased by the appellants largely in the form of quotations from the opinions of this Court.

Furthermore, the clear import of Judge HUTCHESON's opinion is that the Plan is "unfair" to the bondholders and that the Commission should provide better treatment for

them: he remanded the Plan for the purpose of working out "a *really* fair and equitable plan" (R. 948, emphasis supplied). He did not find that the Commission had failed to follow the statutory mandates or lacked material evidence to support its conclusions; if he had so found, the logical course would have been to remand the Plan for further consideration by the Commission, as this Court did in the *Milwaukee* case on sustaining the objections to the treatment of the holders of the General Mortgage Bonds (318 U. S. 569-571) and as the Court of Appeals for the Second Circuit did in *In Re New York, N. H. & H. R. Co.*, (1945) 147 F. (2d) 40 (1940).

The principal reason which Judge HUTCHESON gave for concluding that the Plan was "unfair" was that it was the duty of the Court of Appeals "to accord full weight to [Judge SIBLEY's] conclusions that the Plan was not fair" (R. 945), a reason which clearly presupposed that it was the function of the District Court to determine, after the "independent investigation" to which Judge SIBLEY referred, whether the Plan was "fair" in the colloquial sense, and that it was the duty of the Court of Appeals "to accord full weight" to such a conclusion.

The view of the respective functions of the Commission and the Court adopted by the majority in the Court of Appeals was, therefore, substantially the same as that held by those who, prior to the decisions of this Court in the *Western Pacific* and *Milwaukee* cases, asserted that under Section 77 the Commission and the Court had coordinate jurisdiction to determine whether a plan was "fair".

Judge HOLMES correctly stated the respective functions of the Commission and the Court (R. 951, 953-954):

> "The court has its limited duties to perform, as does the Commission; but each acts separately within its special sphere, and neither is permitted to usurp the prerogatives of the other."
>
> • • • • • • • •

> "The functions of the court, in approving or rejecting a plan, are purely judicial. The delegated power of the Commission in devising and proposing the plan is legislative, executive, and quasi-judicial. The greatest tribute that can be paid to the federal courts is that they do not seek to extend their jurisdiction by usurpation. Cf. Rose on Federal Jurisdiction (2nd Ed.), Section 16, p. 21."

The Courts of Appeals in other Circuits have respected the correct division of authority between the Commission and the Courts in the cases referred to above at p. 2. There is, therefore, a conflict between the decision of the Court of Appeals in this case and the several decisions of Courts of Appeals in other Circuits above referred to. Moreover, unless this case be reviewed, it may be expected that the opinions herein will not only substantially veto this Court's opinions in the *Western Pacific, Milwaukee* and *Denver* cases so far as the Fifth Circuit is concerned, but that they will cause confusion and uncertainty in other Circuits.

• • • • •

After having said that he would defer "to the finding that the valuation of the railroad property as fixed by the Commission is equalled by that of the Coast Line securities" (R. 479) Judge SIBLEY suggested that there was "a fault in the Commission's finding of equivalency" in that the Commission "overlooked that the plan makes the preferred stock callable at par at any time" (R. 480). There was so little basis for a conclusion that this feature of the Plan was "overlooked" (267 I. C. C. 753) that no serious effort was made in the Court of Appeals to sustain Judge SIBLEY's order on that ground and it is not mentioned in Judge HUTCHESON's opinion, unless possibly by the reference in that opinion to Judge SIBLEY's "other reasons" (R. 946).[1]

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[1] The plan proposed by the Coast Line provided for non-participating, non-voting preferred stock, callable at par and accrued dividends (267 I. C. C. 297-298). The Commission made the stock participating and voting (267

(*Continued on p. 23*)

QUESTION (3)

The Power of the Court to Supervise the Commission's Discharge of its Responsibilities

Judge HUTCHESON expressed the opinion that the "tremendous overemphasis on and the preoccupation of the commission* with the struggle on the one hand of the St. Joe Paper Co., and on the other, of Coast Line for control of the debtor, with its subordination of the primary question of the legal and equitable rights of the bondholders as such" led to the approval by the Commission of a Plan which was "unfair" to the bondholders (R. 945-946). Judge RUSSELL apparently agreed with Judge HUTCHESON as to this (R. 950).

Judge HUTCHESON did not hold that the Commission had failed to follow the statutory mandates or lacked material evidence to support its conclusions.

As already noted at p. 9-10, what Judge HUTCHESON called "the struggle * * * for control of the debtor" involved not merely the question whether there should be St. Joe Paper Company control, with consequent positive disadvantages to the public, but also the question whether there should be a merger with the Atlantic Coast Line, with consequent important advantages to the public in financial stability, economies of operation and betterment of service. The Commission was clearly right in its view that the public interest in the future operation of the railroad as part of the national transportation system was worthy of its fullest consideration.

As also already noted at p. 11, the Commission's con-

(*Continued from p. 22*)

I. C. C. 376, 753-754). It estimated the probable prospective market value at $70 a share (267 I. C. C. 737). The Commission did not merely provide in the order approving the Plan that the preferred stock should be redeemable (267 I. C. C. 753); it specifically referred to that feature of the stock in its report of April 8, 1947 (267 I. C. C. 380-381). The redemption price (par, plus accumulated dividends and the current dividend to the date of redemption) was bound to be almost 50% more than the estimated market price of the preferred stock under market conditions prevailing when the Commission acted. The bondholders could not object to such a redemption provision. On the other hand, the Commission has never approved a non-callable preferred stock for a railroad undergoing reorganization in Section 77.

* Footnote omitted.

sideration of the private interests was extensive and reflected a clear conception of its duty to provide "equitable equivalents" for the bondholders.

Judge HUTCHESON's opinion that "the legal and equitable rights of the bondholders as such presented the *primary* question" is in conflict with many statements in this Court's opinions. Cf. *Western Pacific* case, 318 U. S. p. 468, and the first *Denver case*, 328 U. S. p. 535-536. As he considered the private interests primary, Judge HUTCHESON must have considered the public interest secondary.

The Commission correctly stated the theory of Section 77 and its own responsibilities (267 I. C. C. 305):

> "[The Atlantic Coast Line] has been admitted as a party to the proceedings by us pursuant to our authority and duty to promulgate a plan which is not only fair and equitable to the creditors but compatible with the public interest in the maintenance of an adequate transportation system. This is in full accord with the theory of the act. Under the statute we are charged with the dual duty of promulgating a plan which will be fair and equitable to the creditors and which will be compatible with the public interest."

Actually there was no conflict between the public interest and the private interests of the bondholders *as a class* in obtaining the best possible treatment for their bonds, since the Commission found that the merger plan would provide better treatment than an internal plan (267 I. C. C. 379, 740-741).

The sentences or small sections of the Commission's comprehensive Reports to which Judge HUTCHESON referred in a footnote (R. 945-946) as evidencing the Commission's "tremendous overemphasis" on and "preoccupation" with control are either unexceptionable or immaterial. To put them in their proper setting and analyze them would unduly extend this statement.[1]

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[1] To mention the one which is referred to in the footnote at the greatest length:

(*Continued on p. 25*)

Judge HUTCHESON's conclusion that the Commission overemphasized and was preoccupied with the question of control was presumably based primarily on the extent to which all phases of the public interest were discussed in the Commission's Report of April 8, 1947. He made no specific criticism of the extensive discussion in that Report, already referred to, of the private interests. Moreover, he gave no weight to the fact that the proceedings in connection with the reargument, consuming almost a year, culminated in the Commission's Report of March 25, 1948, which was devoted almost exclusively, except for the discussion of legal questions, to the treatment of the bondholders (267 I. C. C. 729-745).

More important, it is clear that Judge HUTCHESON undertook to exercise a type of supervision over the discharge by the Commission of its responsibilities which the Congress did not intend the Courts to exercise in Section 77

(*Continued from p. 24*)

The reference to a foreclosure sale is contained in the report of April 8, 1947 (267 I.C.C. 307). That report followed shortly after Judge FRANK of the Circuit Court of Appeals for the Second Circuit had handed down his dissenting opinion in *Old Colony Bondholders* v. *New York, New Haven & H. R. R. Co.* 161 F. (2d) 413, 431-439, and before this Court had denied certiorari in *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & H. R. R. Co.* (1947), 331 U. S. 858, rehearing denied (1947) 332 U. S. 803. There was therefore confusion and uncertainty as to the possible necessity for a foreclosure sale. The minority of the Commission insisted that the Atlantic Coast Line should not acquire the property except "as a result of making the highest and best bid at a public sale at which other bidders, including the bondholders of the debtor, have a chance to compete" (267 I. C. C. 391), although this proposition was not repeated in the dissent to the report on March 25, 1948 after this Court had denied certiorari in the *Old Colony* case (267 I. C. C. 745-747).

The discussion of a foreclosure sale in the report of April 8, 1947 was irrelevant, and was superseded by an able analysis of the law in the report of March 25, 1948 (267 I. C. C. 732-734).

However, the sentence quoted by Judge HUTCHESON does not lead to any inference that the Commission was preoccupied with the subject of control. The gist of it is that a requirement for a judicial sale would almost certainly block the approved plan. In the event of such a sale the bondholders could bid with their bonds and any bid by the Atlantic Coast Line would have to be all in cash. Except possibly through an underwriting at heavy cost, the Coast Line could not make a successful "all cash" bid even if a competing bid of bondholders wishing to acquire the property was much less than the value of the cash and securities to be provided for by the Coast Line under the Plan. The Commission may well have assumed that it would not approve the heavy cost of underwriting an "all cash" bid, as underwriting costs caused much of the criticism of equity foreclosures prior to the enactment of Section 77. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.* (1935) 294 U. S. 648, 685.

cases. He did not hold that the Commission had failed to follow the statutory mandates or lacked material evidence to support its conclusions as to the treatment of the bondholders. Instead, drawing an inference as to the subjective processes of members of the Commission, he took as a premise that a majority of the Commission were preoccupied with matters of the public interest and from that proceeded to the conclusion, which would hardly follow from the premise, that the Commission should have provided better treatment for the bondholders.

QUESTION (4)

The Materiality of Opposition to the Plan

Judge SIBLEY, whose opinion Judge RUSSELL adopted, considered the opposition of a majority in amount of the holders of the First and Refunding Mortgage absolutely decisive: that opposition was the basis for the first two grounds which he gave for disapproval of the Plan (R. 475-477) and in considering whether the Plan was "fair and equitable" he said (R. 478):

> "Most of the bondholders wish to continue to own and run the railroad. Many of them bought bonds during this proceeding with that purpose, as they had a right to do."

Judge HUTCHESON ruled that the power existed to effect "a merger over the objection of the debtor and all its creditors" (R. 947). He also spoke of "such irrelevancies as desire for control" (R. 947), indicating that the St. Joe Paper Company's desire "to own and run the railroad" was not a valid basis for an objection to the Plan, although Judge SIBLEY's opinion is replete with evidence that he regarded a desire "to own and run the railroad" as the strongest and most reasonable basis for objecting to the Plan. But Judge HUTCHESON concluded by giving dominant effect to the opposition of the Claughton group, the Conn group and the Lynch inter-

ests (R. 947). He did not say that any of those three groups had shown that the Plan provided an inadequate consideration for the Bonds; he did not discuss the evidence that they had reasons not common to the bondholders as a class for opposing the merger plan;[1] after having said that the consummation of the Plan "would be natural and reasonable" except for the opposition to it (R. 943), he treated the fact that the Claughton, Conn and Lynch groups opposed the Plan as justifying the conclusion that it was unfair in the colloquial sense.

The treatment of the mere fact of opposition, however substantial the opposition may be, as establishing anything of legal significance conflicts with this Court's rulings in *National Surety Co.* v. *Coriell* (1933) 289 U. S. 426, 435-437; *First National Bank* v. *Flershem* (1934) 290 U. S. 504, 525-526; *Case* v. *Los Angeles Lumber Products Co.* (1939) 308 U. S. 106, 114-115; and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company* (1946) 328 U. S. 495. It also presents a clear conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In Re New York, N. H. & H. R. Co.* (1945) 147 F. (2d) 40, 49.

The law was correctly stated by Judge Holmes (R. 952):

> "There is no provision of law for the court or judge to submit the plan to the creditors or to give any consideration before the vote is taken to how the creditors will vote on it. The best rule for any court, trial or appellate, is to decide the issues presented to it and to decide nothing more than is necessary to dispose of the case. *Dictum* should be avoided and forecasts discountenanced."

The Commission made a quasi-judicial determination on the basis of the evidence. The gist of the opinions of a majority of the Court of Appeals is that it should make a redetermination and that even if the evidence be the same it should reach a different conclusion because holders of

[1] See above, p. 12-14.

bonds, small in number though large in amount, disagree with the determination.

QUESTION (5)

The Court's Supervision of the Commission's Discharge of Its Responsibilities

Despite the Commission's finding that a merger would produce greater financial stability, economies of operation and betterment of service, Judge RUSSELL adopted Judge SIBLEY's view that if a majority in amount of the bondholders "wish to continue to own and run the railroad" a merger plan "ought to be a last resort" (R. 478).

Judge HUTCHESON may also have adopted Judge SIBLEY's view on this subject, since he spoke with approval of Judge SIBLEY's "other reasons" for holding the plan not "fair and equitable" (R. 946). In any event, after making the extraordinary statement that "the Commission has changed and vacillated, and vacillated and changed, and vacillated again",[1] he referred to the Commission as having developed "an *idee fixe*" and as having approved the Plan "in desperation" (R. 948).

Under this Court's decisions the Commission has the "leadership" in deciding whether a merger plan or an internal plan is more suitable. *Western Pacific* case, 318 U. S. p. 468.

The policy of the Congress is to favor the unification of non-competing carriers in order to strengthen the national transportation system. *Schwabacher* v. *U. S.* (1948) 334 U. S. 182, 191-194. The Commission has rightly facilitated the "union of the weak with the strong". *Nickel Plate Unification* (1926) 105 I. C. C. 425, 449. What is more suitable than a plan for the unification of an insolvent short-line railroad with a strong connecting trunk line?

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[1] This statement is extraordinary because the Commission has made only one significant change—from an internal plan to a merger plan—and it made that change (i) after strong objections from bondholders to the internal plan, (ii) a reopening of the case, (iii) a hearing lasting for almost a full month, and (iv) extensive consideration, including a reargument.

The successful reorganization of the Alton through unification with the Gulf, Mobile and Ohio testifies to the wisdom of Congress in expressly providing in Section 77(b) for such a merger plan. *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343. Judge HUTCHESON referred to the Plan in this case as "natural" except for one thing, viz, the opposition of bondholders (R. 943).

Clearly the fact that a small number of bondholders opposed the Plan did not compel the Commission to consider the approval of the Plan "a last resort", even though the opponents of the Plan held a large amount of Bonds. The statement by the Court that a merger plan "ought to be a last resort" cannot be reconciled with this Court's declaration that Congress intended "to place reorganization under the leadership of the Commission".

QUESTIONS (6), (7) & (8)

The Court's Consideration of "Changed Conditions"

Judge SIBLEY said (R. 479):

> "* * * I am impressed that evidence produced before me, if it had been before the Commission, might have produced a different result. The materials for some of it already existed, but were not assembled for or considered by the Commission, and some relate to occurrences since it made its finding."

This reason for the disapproval of the Plan was adopted by Judge RUSSELL and appears also to be included among Judge SIBLEY's "other reasons" adopted by Judge HUTCHESON (R. 946).

In the sentences succeeding those quoted Judge SIBLEY made a number of statements which we deem erroneous, but we will not pause to note the errors, except to say that his statement that "the East Coast has consistently continued to net more than $1,500,000 that the Commission has fixed as its normal rate" is in direct conflict with the Commission's finding as to the earnings for the year

1947 (the last year for which figures were before the Commission) as calculated by the Commission after two clearly necessary adjustments of the reported earnings (267 I. C. C. 738-739).

It is perfectly clear that Judge SIBLEY purported to express an over-all judgment that the Plan is "unfair" without distinguishing between

(1) evidence before the Commission;

(2) evidence relating to the period prior to March 25, 1948, which could have been, but was not, before the Commission; and

(3) evidence relating to the period subsequent to March 25, 1948.

Judge SIBLEY made no finding, and there was no basis for a finding, that there was any change in conditions after the Commission had issued its report of March 25, 1948 which made the Plan, if "fair" on that date, unfair later.

Taking Questions (6), (7) and (8) in sequence:

(6) Under this Court's decisions it is not permissible for a District Court to form an over-all judgment, based on all of the categories of evidence listed above, and to make no distinction between the conditions which existed at the time when the Commission approved a plan and those that exist when the plan comes on for approval by the Court. If such a course were permissible the inevitable effect would be to obliterate the division of authority between the Commission and the Court which this Court has found Section 77 prescribes.

(7) The statements in this part of Judge SIBLEY's opinion do not constitute findings to which Rule 52 (a) of the Federal Rules of Civil Procedure applies. Whether or not Rule 52 (a) could ever apply, Judge SIBLEY did not "find the facts specially". Furthermore, he limited himself to indicating the things by which he was "impressed" and those by which he was "confused" (R. 479).

(8) The decisions of this Court relating to the approval of plans may have left open the question whether changes

in conditions subsequent to the approval of a plan by the Commission may warrant a disapproval of a plan by the Court, although the first *Denver* case dealt with the effect of changes between the approval of a plan and its confirmation (328 U. S. 495, 535). But, whatever may have been the situation prior to the enactment of Section 3 (a) (3) of the Mahaffie Act, the text of which will be found at the end of the Appendix, we submit that the law is now clear and that in this case any opposition to the Plan on the ground that there have been changes in conditions should be the basis of a petition to the Interstate Commerce Commission and cannot be the basis of an objection to the Plan in the Court.

The reason why the opponents of the Plan have not had recourse to Section 3 (a) (3) of the Mahaffie Act will readily appear from an examination of Atlantic Coast Line Exhibits Nos. 19 and 20 in Vol. II of the Record, which establish that any changes in conditions between the time of the Commission's approval of the Plan and Judge SIBLEY's disapproval of it operated to make the Plan even more favorable than it appeared when the Commission acted.

QUESTION (9)

The petitioners contend that under 28 U. S. C. § 2106 this Court has the power to remand the cause and direct the entry of an order approving the plan and if the writ be granted will urge this Court to do so.

Statements in, and Omissions From, Judge Sibley's Opinion

The petitioners adhered below to the view expressed herein as to the respective powers of the Commission and the Court, but under all the circumstances they considered it suitable to discuss in their briefs in the Court of Appeals many statements in Judge SIBLEY's opinion which they deemed clearly erroneous and many omissions from Judge

SIBLEY's opinion with respect to facts which would be material if the test were one of "colloquial equity". In view of the requirements of Rule 38 (2) of this Court the petitioners have not followed a similar course in this statement and they see no reason to expect that it will be necessary for them to do so if certiorari be granted.

Points Urged Below by Respondents

Reference has been made above at p. 14-15 to the first two grounds of Judge SIBLEY's disapproval of the Plan which were not sustained by a majority of the Court of Appeals. Judge HOLMES disposed of both these grounds for reasons that are unassailable (R. 950-952). They are referred to here only in order to be sure that, if the questions they present are argued by the respondents, petitioners will not be barred from replying to the respondents' arguments. It is assumed that if any of the respondents should argue any grounds for the disapproval of the Plan in addition to the three grounds given in Judge SIBLEY's opinion, petitioners will not be barred from answering the respondents' arguments.

CONCLUSION

This Court's opinions in the *Western Pacific, Milwaukee* and *Denver* cases established that the Congress intended the primary sanctions for a railroad reorganization under Section 77 to be determinations of the Commission, legislative and administrative as to the public interest and quasi-judicial as to the private interests.

Section 77 was thus construed as ending the uncertain and constantly shifting distribution of power among security holders, the Courts and the Commission. It was confirmed that the Commission has primary power as to essentially business questions, as well as to matters of the public interest, subject only to requirements for judicial review which are usually applicable to administrative bodies.

The decision of the Court below undertakes to redistribute that primary power among the security holders, the Courts and the Commission in a manner wholly inconsistent with this Court's opinions and certain to create endless confusion. The opposition of a small number of holders of a large amount of bonds was treated below as of paramount importance; a single Judge sitting in the District Court was deemed to be authorized to determine what was "fair" in the colloquial sense and observations in the Judge's opinion which were not framed as findings or directed to any specific issue cognizable by the Court were treated by the Court of Appeals as binding; and the Commission's findings and conclusions were regarded as having no more weight than those of a Special Master.

The District Judge Designate and the Court of Appeals committed clear errors of law, the correction of which by this Court could greatly expedite the termination of this proceeding and the reorganization of a Debtor which has been in the Courts since August 31, 1931.

We respectfully submit that the writ should be granted.

Dated February 10, 1950

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MOTION TO DISPENSE WITH THE PRINTING OF THOSE PORTIONS OF THE RECORD CERTIFIED BY THE DISTRICT COURT TO THE COURT OF APPEALS WHICH WERE NOT PRINTED IN THE COURT OF APPEALS

1. A very large portion of the Record in the District Court which was transmitted to the Court of Appeals, including the greater part of the Record before the Interstate Commerce Commission (exclusive of the Commission's Reports), was not printed in the Court of Appeals, and has been transmitted by the Clerk of the Court of Appeals to the Clerk of this Court in the form in which it was received by the Clerk of the Court of Appeals from the Clerk of the District Court.

The circumstance that said portions of the Record in the Court of Appeals were not printed for the use of that Court presented no difficulty in connection with that Court's consideration and determination of the appeals.

A motion in that Court was made by the appellants with a view to ascertaining whether the Court of Appeals desired additional printing and the Court of Appeals deferred any action thereon until the argument.

A motion was then made by certain of the appellees to require the appellants to print any unprinted portions of the record to which they might refer in their briefs and the Court of Appeals similarly deferred action on the appellees' motion until the argument.

On the argument neither the Court nor the appellees made any suggestion that any additional printing was necessary or desirable.

2. The printed portions of the Record in the Court of Appeals, which have been duly certified to this Court, are as follows:

Vols. I and II, printed at the request of the appellants, containing, among other things, photo-lithographed copies of the Commission's Reports of January 8, 1945 (261

I. C. C. 151-193), April 8, 1947 (267 I. C. C. 295-391) and March 25, 1948 (267 I. C. C. 729-759) and the Commission's Orders of April 8, 1947 and March 25, 1948, which are at the end of the Report of March 25, 1948; the transcript of the hearing before the Judge Designate in January 1949, exclusive of the argument; photo-lithographed copies of the exhibits introduced at that hearing; Judge SIBLEY's opinion; and sundry formal papers, including the appellants' Designations of the Contents of Record;

Vol. III, printed at the request of the appellees W. G. Welbon, *et al.* and St. Joe Paper Company.

3. The portion of the Record in the Court of Appeals to which this motion relates consists of all of the documents specified in the respective Designations of Contents of Record on Appeal which were not covered by the respective Requests for Printing. The most important items comprise the record before the Interstate Commerce Commission, contained in 13 packages, each package being covered by a certificate of the Secretary of the Commission (R. 484-502). The Interstate Commerce Commission Record includes not only 5,140 pages of transcript and 303 exhibits (many of the exhibits being voluminous) but also a very large number of other things and it is estimated that the printing of the entire record before the Commission would require at least 40 volumes and perhaps many more.

4. In the Court of Appeals references were made by both sides to the unprinted portions of the Record and, as already indicated, no difficulty was encountered on that score.

5. It is not deemed practicable to undertake to stipulate, pursuant to Rule 38 (8) of this Court, with respect to printing parts of the unprinted portion of the Record to which this motion relates. Because of the mass of material involved and the difficulty of being certain in advance as

to the points which the respondents may present in an effort to sustain the disapproval of the Plan, it would be difficult to agree upon a stipulation even if there were only one respondent. There are eight and their counsel are located in five cities, Jacksonville, Miami, Tampa, Washington and New York.

WHEREFORE, your petitioners pray that this Court enter an order dispensing with the printing of those portions of the Record certified by the District Court to the Court of Appeals which were not printed in the Court of Appeals.

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APPENDIX

Attributes of Plan of Reorganization.

SECTION 77(b)—first paragraph in full.[1]

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,* the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any

[1] The text of all Section 77 provisions is taken from 11 U. S. C. A. § 205. Italics are supplied.

assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

Approval of Plan by Commission.

SECTION 77(d)—first paragraph in part.

* * * the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

Approval of Plan by Court.

SECTION 77(e)—first paragraph and first sentence of second paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objection to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and

their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment.

After such hearing, and without any hearing if no objections are filed, *the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;* (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed as far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, *in which event he shall transmit to the Commission a copy of any evidence received.*

Confirmation of Plan—the "Cram-down" Provision.

SECTION 77(e)—third paragraph in part.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *.

Valuation.

SECTION 77(e)—fourth paragraph in full.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the prop-

erty, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

Changed Conditions.

THE MAHAFFIE ACT, Section 3 (a) (3)
62 Stat. 162, 167-168.

(The Plan in this case was certified to the District Court on April 5, 1948. The Mahaffie Act was approved on April 9, 1948.)

Sec. 3. (a) Notwithstanding any other provision of law—

* * * * *

(3) with respect to any plan of reorganization or modified plan of reorganization which, on the date of enactment of this Act, is before any district court for approval or confirmation, no order of confirmation having been entered, or, such order having been entered, if an appeal from said order is pending in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such an appeal or to file such petition has not expired, it shall be the duty of the Commission, upon petition of any party to the proceeding, to report to such court any changes, facts, or developments which have occurred since December 31, 1939, which were not provided for in the plan and which, in the opinion of the Commission, make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that if consummated and put into effect, such plan shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bankruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;